

An Explanatory Guide to the Cartagena Protocol on Biosafety

Ruth Mackenzie, Françoise Burhenne-Guilmin,
Antonio G.M. La Viña and Jacob D. Werksman
in cooperation with Alfonso Ascencio,
Julian Kinderlerer, Katharina Kummer
and Richard Tapper

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Table of Contents

Foreword	ix
List of contributors	x
Acknowledgements	xi
List of abbreviations	xiii
List of short titles of international instruments	xiv
Structure and purpose of this Guide	xv
Introduction	1
I Origin and history	1
Box 1. What is a protocol?	2
Box 2. The road to the Cartagena protocol on biosafety (and beyond)	2
Box 3. 1996–2000. The negotiation phase	5
II Status and interim measures	5
III The issue: biosafety	5
Box 4. History	6
Box 5. Examples of genetic modification	9
IV Cross-cutting issues	11
Box 6. Principle 15 of the Rio Declaration	13
V Overview of the Protocol	14
Box 7. Scope of the Protocol and of the AIA procedure: Articles 4–7	15
VI Implications of the Protocol	20
VII Other international instruments relevant to the Protocol	20
Box 8. Possible elements of national biosafety regulations	21
Preamble	25
Box 9. Centres of origin and centres of genetic diversity	26
Article 1 Objective	31
Box 10. Provisions relating to transboundary movements only and provisions addressing a broader scope of activities	34
Article 2 General provisions	35
Box 11. Navigational rights and freedoms and transboundary movements of LMOs	37
Box 12. <i>Codex Alimentarius</i> and Genetically Modified Foods	39
Article 3 Use of terms	41
Box 13. Examples of definition of “contained use” in national legislation	42
Box 14. Genetic material: chromosomes, genes and nucleic acids	44
Box 15. Comparison of the term LMO in the CBD and in Article 3 of the Protocol	46
Box 16. Description of gene constructs used in <i>in vitro</i> nucleic acid techniques	47
Box 17. Cell fusion	48
Box 18. Stages in making a new LMO using insertion of recombinant DNA	48
Box 19. Description of natural physiological reproductive and recombination barriers	50
Article 4 Scope	53
Box 20. Understanding the concept of “scope” in the Protocol	53
Article 5 Pharmaceuticals	55
Box 21. Why were pharmaceuticals a controversial issue?	55
Box 22. Transboundary movement of pharmaceuticals for humans	57

Article 6	Transit and contained use	59
Article 7	Application of the Advance Informed Agreement procedure	63
	Box 23. What is AIA?	63
	Box 24. Is this transboundary movement of this LMO subject to the AIA procedure?	65
	Box 25. Advance Informed Agreement Procedure	66
	Box 26. Intentional introduction into the environment of a LMO	68
Article 8	Notification	71
	Box 27. Possible notification ‘routes’ under Article 8	72
Article 9	Acknowledgement of receipt of notification	75
Article 10	Decision procedure	79
Article 11	Procedure for living modified organisms intended for direct use as food or feed, or for processing	85
Article 12	Review of decisions	93
Article 13	Simplified procedure	97
Article 14	Bilateral, regional and multilateral agreements and arrangements	99
	Box 28. Example of a regional arrangement	102
General introduction to Articles 15–16 and Annex III		105
Article 15	Risk assessment	107
	Box 29. Examples of the types of scientific expertise and information for undertaking risk assessments relating to LMOs	109
	Box 30. Categorization of direct, indirect, immediate and delayed effects	109
Article 16	Risk management	111
Article 17	Unintentional transboundary movements and emergency measures	115
	Box 31. Article 14(1)(d) CBD	116
	Box 32. Article 17 and non-Parties	121
Article 18	Handling, transport, packaging and identification	123
	Box 33. The United Nations Recommendations on the Transport of Dangerous Goods (the “Orange Book”)	125
	Box 34. Unique identification of LMOs	126
Article 19	Competent national authorities and national focal points	129
Article 20	Information-sharing and the Biosafety Clearing-House	131
	Box 35. The Clearing-House Mechanism of the CBD (Article 18(3) CBD)	132
	Box 36. Existing international biosafety information exchange mechanisms: examples	133
	Box 37. Pilot phase of the Biosafety Clearing-House	135
Article 21	Confidential information	137
	Box 38. National provisions on confidential information: examples	139
Article 22	Capacity-building	143
	Box 39. Indicative list of areas of advice and support for the roster of experts for implementation of the Cartagena Protocol	147
Article 23	Public awareness and participation	149
	Box 40. Principle 10 of the Rio Declaration	149
	Box 41. Information and public participation in decision-making	151
Article 24	Non-Parties	153
	Box 42. Approaches to transboundary movements between Parties and non-Parties in selected multilateral environmental agreements	154
	Box 43. Responsibilities of the States involved in transboundary movement between Party and non-Party	157

Article 25	Illegal transboundary movements	159
Article 26	Socio-economic considerations	163
Article 27	Liability and redress	167
	Box 44. Other international conventions and processes relating to liability and redress: examples	168
	Box 45. Core issues commonly addressed in liability and redress regimes	170
General introduction to Articles 28–31		171
Article 28	Financial mechanism and resources	173
	Box 46. The Global Environment Facility (GEF)	175
	Box 47. Financial assistance for biosafety: example	177
	Box 48. Bilateral assistance for capacity-building in biosafety: examples	178
Article 29	Conference of the Parties serving as the meeting of the Parties to this Protocol	179
Article 30	Subsidiary bodies	185
	Box 49. Functions of SBSTTA under Article 25 CBD	186
Article 31	Secretariat	187
Article 32	Relationship with the CBD	189
Article 33	Monitoring and reporting	191
Article 34	Compliance	193
	Box 50. Core elements and characteristics of existing and emerging compliance mechanisms in multilateral environment agreements	193
	Box 51. Dispute settlement provisions of the CBD	194
	Box 52. Compliance mechanisms under other multilateral environmental agreements	195
Article 35	Assessment and review	197
Article 36	Signature	199
Article 37	Entry into force	201
Article 38	Reservations	203
Article 39	Withdrawal	205
Article 40	Authentic texts	207
Annex I	Information required in notifications under Articles 8, 10 and 13	209
Annex II	Information required concerning living modified organisms intended for direct use as food or feed, or for processing under Article 11	215
Annex III	Risk assessment	217
Appendix	The Cartagena Protocol and the World Trade Organization	225
	Box 53. Examples of trade-related measures under the Protocol	228
	Box 54. The “like product” test	234
	Box 55. General exceptions under the GATT	234
Bibliography		241
Supplementary materials		243
	Cartagena Protocol on Biosafety to the Convention on Biological Diversity	245
	Convention on Biological Diversity	263
	Conference of the Parties to the Convention on Biological Diversity: Decision II/5	281
	Conference of the Parties to the Convention on Biological Diversity: Decision EM-I/3	285
	Intergovernmental Committee for the Cartagena Protocol: Recommendation 3/5, Annex III – Implementation tool kit	287
Index		291

Foreword

The Cartagena Protocol on Biosafety is one of the most important international treaties recently adopted. It marks the commitment of the international community to ensure the safe transfer, handling and use of living modified organisms. It is an historic commitment as it is the first binding international agreement dealing with biosafety, thereby addressing novel and controversial issues.

To conclude the negotiation of a treaty marks an end, but also a beginning: the beginning of an implementation process which will determine whether the results of the negotiation will, in reality, achieve the objective which originally set the negotiation process in motion. One prerequisite for the successful implementation of a treaty is an understanding of the text itself, and of its implications. In this regard, the Cartagena Protocol is a text that may well not be readily accessible to all those who will need to become involved, in one way or the other, with its implementation. We hope that this Explanatory Guide will both make the Protocol more readily accessible and prove useful as a reference work for those who are involved in its implementation.

IUCN and FIELD are pleased to present the results of a two year process of cooperation and consultation, during which they were joined by WRI. The partnership forged during the preparation of the Guide has been fruitful, constructive, and harmonious. We therefore look forward to continuing our joint efforts in this and related fields, and express our gratitude to those who made this collaboration possible.

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The Guide is the product of a process which started early in 2001. It is the result of the collaboration of IUCN Environmental Law Centre and the Foundation for International Environmental Law and Development (FIELD), later joined by the World Resources Institute. It is also the result of a consultation process over nearly two years.

The initial draft of the Guide, prepared by a small group of authors, was the starting point for an extensive consultation process, producing at each step a refined version. The cornerstones of this consultation process were three workshops, held in September 2001, October 2001, and February 2002.

The participants in the first workshop were all familiar with the Protocol text, and had all participated in its negotiation, either as governmental delegate, or as representative of the non-governmental sector. The purpose of this first workshop was to elicit comments on the content of the Guide, in particular its accuracy, and to identify gaps and deficiencies, as well as to obtain information on some of the negotiating history.

The second workshop was aimed at obtaining comments on the content of the Guide from the perspective of its future users, and feedback on whether the text, in substance and format, facilitated the understanding of the Protocol for those who will work with it in the future. Participants were all from the Central and Eastern European region, and included individuals working in government, non-governmental organizations, and the private sector.

The final workshop considered a completed, revised and edited draft of the Guide. Emphasis was on participation from all parts of the world, in particular developing countries, and from NGOs. In order to maintain continuity, a number of participants who had participated in the first or second workshops were also invited. The workshop reviewed the draft first in plenary, then went through clusters of issues and the corresponding commentaries in working groups, with results reviewed again in plenary to complete the process.

Participants to all workshops attended in a personal capacity, and many of them continued to follow the progress of the Guide throughout the process, commenting on interim stages of the Guide by e-mail.

The “pre-final” draft of the Guide, which resulted from the comments received at the third workshop, was made available to participants at the third meeting of the Intergovernmental Committee for the Cartagena Protocol in the Hague in April 2002. It was also posted on the web sites of IUCN-ELC and FIELD in order to generate further review and comments before the text was finalized.

As a result of this process, many people have assisted in the preparation of the Guide, not only by participating in the workshops described above, but also by providing thoughtful verbal or written comments. All of the comments received were carefully considered by the authors in the preparation of the final text.

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Our thanks go to all those mentioned above, and others, for their contribution to the Guide. We, however, remain responsible for any weaknesses that remain.

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October 2002*

List of abbreviations

AIA	Advanced Informed Agreement
BCH	Biosafety Clearing-House
BSWG	Ad Hoc Working Group on Biosafety
CBD	Convention on Biological Diversity
CHM	Clearing-House Mechanism – established under Article 18(3) CBD
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties to the Convention on Biological Diversity
COP/MOP	Conference of the Parties serving as the meeting of the Parties to the Protocol
DNA	Deoxyribonucleic acid
EU	European Union
ExCOP	First extraordinary meeting of the Conference of the Parties
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GMO	Genetically Modified Organism
ICCP	Intergovernmental Committee for the Cartagena Protocol
ILC	International Law Commission
LMO	Living Modified Organism
LMO-FFPs	Living Modified Organisms Intended for Direct Use as Food or Feed, or for Processing
MEA	Multilateral Environmental Agreement
REIO	Regional Economic Integration Organization
RNA	Ribonucleic acid
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice (of the CBD)
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBM	Transboundary Movement
TBT Agreement	Agreement on Technical Barriers to Trade
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
WHO	World Health Organization
WTO	World Trade Organization

List of short titles of international instruments

Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, ECE/CEP/43
Agenda 21	UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1 (1992)
Basel Convention	Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, UNTS vol. 1673 p. 57
Biodiversity Convention	Convention on Biological Diversity, 5 June 1992, UNTS vol. 1760 p.79
Climate Change Convention	United Nations Framework Convention on Climate Change, 9 May 1992, UNTS vol. 1771 p. 107
Kyoto Protocol	Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, Decision 1/CP.3 of the Conference of the Parties to the Convention
Montreal Protocol	Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, UNTS 1522
Rio Declaration	UN Declaration on Environment and Development, June 14, 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 ILM. 876 (1992)
Rotterdam Convention	Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, UNEP/FAO/PIC/CONF/5
Stockholm Convention	Convention on Persistent Organic Pollutants, 22 May 2001, Depository Notification C.N.531.2001, Treaties-96 of 19 June 2001
Stockholm Declaration	Declaration of the UN Conference on the Human Environment, June 16, 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), reprinted in 11 ILM 1416 (1972)
Vienna Convention	Convention on the Law of Treaties, 23 May 1969, UNTS vol. 1155 p. 331

Structure and purpose of this Guide

The main goal of the Guide is to facilitate the understanding of the legal obligations of the Parties under the Cartagena Protocol on Biosafety. It is an explanatory guide, which attempts to provide an information base on the content and origin of the provisions of the Protocol. While it is hoped that the Guide will contribute to the implementation of the Protocol, it is not intended as a detailed guide on how to implement the Protocol at the national level. Rather it attempts to provide an accessible explanation of the Protocol's provisions and to identify issues which Parties may want to consider as they decide how to implement the Protocol.

The Guide begins with a brief Introduction which addresses the subject matter of the Protocol. This section provides general information on the issue the Protocol was intended to address, and the negotiation process. It also provides an overview of the Protocol's provisions, including certain cross-cutting issues. Finally, it identifies certain other international agreements and guidelines of relevance to biosafety. It may be noted here that the "Implementation Tool kit" reproduced in the Supplementary Materials at the end of the Guide also provides a useful overview or checklist of the provisions of the Protocol from an implementation perspective. This "Tool kit" was adopted as part of a recommendation on capacity-building by the Intergovernmental Committee for the Cartagena Protocol (ICCP), the body which was established to undertake preparatory work for the first meeting of the Parties to the Protocol after it enters into effect.

The main section of the Guide provides a "commentary" to each of the Protocol's provisions. This section addresses each Article and Annex of the Protocol in turn and analyzes and explains its provisions. The emphasis here is on outlining the main provisions of the Protocol, as well as highlighting ambiguities or issues which are left unresolved in the text, providing information on possible interpretations, and identifying issues that Parties may want to consider as they develop national implementation measures. Where there are ambiguities in the text, we have tried to provide some guidance as to possible interpretation based upon the provisions of the Protocol, in particular its objective as set out in Article 1. In addition, in a number of instances we have made reference to the negotiating history of the Protocol, and in this regard we were able to draw on advice and inputs from many of those who were closely involved in the negotiations. Of course, a Guide of this type does not purport to provide an authoritative interpretation of the text of the Protocol, and other interpretations are possible. In addition, specific interpretations may be agreed and adopted by the Parties to the Protocol in the future as they consider its provisions further.

When the Protocol was negotiated, States agreed that work on some issues should be left to further negotiation and agreement after the Protocol comes into effect. These include, for example, Article 18(2)(a), Article 27 and Article 34. In these cases, we have given an indication of the work undertaken on these issues by the ICCP. Of course, there are other provisions of the Protocol which the meeting of the Parties may address and provide further guidance on in due course.

The Appendix to the Guide addresses the relationship between the Cartagena Protocol and relevant World Trade Organization Agreements. It was decided to analyze this relationship in detail in an Appendix given the range and complexity of questions that it raises. The potential relationship between the Protocol and relevant WTO Agreements was a contentious issue in the negotiations. The analysis in the Appendix is intended to give a more detailed overview of the types of issues that may arise in assessing this inter-relationship. It does not attempt to, and can not, prejudge the outcome of any particular question or dispute that may arise as to trade measures that a State may impose in relation to LMOs.

The bibliography provides a list of selected writings on the Protocol, largely from academic books and journals.

Finally, we have provided certain supplementary materials for ease of reference at the end of the Guide. These include:

- 2000 Cartagena Protocol on Biosafety – The provisions of the Protocol are reproduced throughout the Guide, but the full text is provided here for ease of reference.
- 1992 Convention on Biological Diversity – As explained in the Introduction, the 1992 Convention is the parent Convention of the Protocol and contains a number of provisions which remain directly applicable or relevant to its implementation.

- Decision II/5 of the Conference of the Parties to the Convention on Biological Diversity – This decision provided the mandate for the negotiation of the Protocol.
- Decision EM-I/3 of the Conference of the Parties to the Convention on Biological Diversity – In this decision the Conference of the Parties to the Convention on Biological Diversity adopted the Cartagena Protocol on Biosafety. The decision also makes provision for interim arrangements, including preparatory work by the ICCP and the establishment of a roster of experts to aid capacity-building.
- ICCP recommendation 3/5, Annex III Implementation tool kit – As noted above, this tool kit, adopted as part of an ICCP recommendation, provides a useful checklist of obligations of Parties to the Protocol.